How the Changes in the Workers' Compensation Law Affect You

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DIVISION OF WORKERS' COMPENSATION

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The recent enactment of Senate Bills 1 and 130 makes significant changes in the Missouri Workers' Compensation Law. Most provisions of the new legislation are effective August 28, 2005.

Please note that for many of the changes, for example, the new definition of accident, the Division of Workers' Compensation (hereafter "Division") cannot predict the precise effect such a change will have on the compensability of injuries in the workplace. This brochure is based upon the Division's analysis of the recent changes in the law. It is to be used as a guide or tool and not as providing a legal opinion.

Each workers' compensation case is fact specific. The interpretation of the law and changes thereto will be determined by the Administrative Law Judges, Labor and Industrial Relations Commission or the Appellate Courts of this state based upon the issues and the evidence presented.

When does the new law become effective?

Most of the provisions become effective on August 28, 2005. Some changes, such as the elimination of legal advisors and the cap on the Second Injury Fund surcharge become effective on January 1, 2006.

It has been said that the liberal construction provision of the law has been repealed. What is the effect of this change? (Section 287.800, RSMo)

Liberal construction of the law with a view to the public welfare, which is the current standard used by the Missouri courts, means that all doubts in an underlying workers' compensation case are resolved in favor of the injured employee and benefits are given to the greatest number of injured employees.

The new law deletes the mandate that the workers' compensation law shall be *liberally* construed, and replaces it with the requirement

that the law shall be *strictly* construed by Administrative Law Judges, the Commission, the Division, and any reviewing court. Furthermore, Administrative Law Judges, Commission, Division and reviewing courts shall weigh the evidence *impartially* without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.

How will the new definitions of "injury" and "accident" affect a workers' compensation case?

(Sections 287.020, 287.063 & 287.067, RSMo)

If the injury occurs on or after August 28, 2005, the new definitions will apply. Primarily, an employee will have to show that work was "the prevailing factor" in causing both the resulting medical condition and disability. The current standard is work has to be "a substantial factor" in causing the injury. Under the current standard an injury is compensable if it is clearly work-related and if work was a substantial factor in causing the resulting medical condition or disability.

An accident means an unexpected "traumatic event or unusual strain identifiable by time and place of occurrence caused by a specific event during a single work shift." The prevailing factor is defined as the primary factor in relation to any other factor, causing both the resulting medical condition and disability.

An occupational disease is compensable only if the occupational exposure was the prevailing factor in causing the resulting medical condition and disability. Aging or normal activities of day-to-day living cannot be considered when determining if the occupational disease is compensable.

The same standards apply to repetitive motion injury. Occupational disease is compensable if the injured worker can demonstrate the workplace caused the occupational disease. The prevailing factor is defined as the primary factor in relation to any other factor, causing both the resulting medical condition and disability.

Are there any injuries that are excluded from being compensable under the new law? (Section 287.020, RSMo)

After August 28, 2005, all injuries and occupational disease must meet the new standard of work being "the prevailing factor" in causing the injury or disease.

The new law states that an injury resulting directly or indirectly from idiopathic causes is not compensable. An idiopathic injury is one that is innate or is a peculiar weakness personal to the employee, unrelated to employment.

Certain injuries that occur when the employee is going to and from the employer's premises are excluded. Under current law, these injuries are probably compensable under the extension of the premises doctrine. Under the new law, only injuries that occur on property owned or controlled by the employer would probably be compensable.

An injury occurring in a company owned vehicle that is being driven by the employee to and from home would no longer be compensable. This change, however, would not affect injuries occurring while driving a company owned car while the person is performing his or her job duties.

Has the new law changed the requirements for an employee to notify the employer about an accident or occupational disease before starting a workers' compensation proceeding, for example, filing a formal claim for compensation with the Division? (Section 287.420, RSMo)

The new law states that, with respect to any accident, an employee has to provide written notice of the time, place and nature of the injury, and the name and address of the person injured to the

employer, no later than thirty days after the accident, **unless** the employer was not prejudiced by failure to receive the notice.

The new law adds the notice requirement for occupational disease or repetitive trauma injuries. The employee has to provide written notice of the time, place and nature of the injury, and the name and address of the person injured to the employer, no later than thirty days after the diagnosis of the condition, **unless** the employee can prove that the employer was not prejudiced by failure to receive the notice.

The employee can still file a Claim for Compensation with the Division within the applicable statutory period of limitations. The Administrative Law Judge, Commission or the Court of Appeals would determine the issue on whether the employee provided the notice to the employer or whether the employer was prejudiced by failure to receive the notice, as required by law.

Does the new law make any changes that affect the firefighters or police officers in any manner?

(Section 287.067.6, RSMo)

The new law states that paid firefighters of a paid fire department or paid police officers of a paid police department that is certified under chapter 590, RSMo, have to establish a direct causal relationship in order to receive workers' compensation benefits for diseases of the lungs or respiratory tract, hypotension, hypertension, or diseases of the heart or cardiovascular system. These diseases are defined to be a disability due to exposure to smoke, gases, carcinogens and inadequate oxygen.

Under the current law, a firefighter of a paid fire department must establish a direct causal relationship in order to receive benefits for psychological stress. The new law does not change this requirement. The new law does not extend the direct causal relationship standard of proof for psychological stress to paid police officers of a paid police department.

What happens if an employee is injured because of the employee's failure to use safety devices provided by the employer or failure to obey a reasonable safety rule of the employer? (Section 287.120.5, RSMo)

Under the new law, if an employee has an injury caused by the employee's failure [not *"willful failure"* which is the current law] to use safety devices provided by the employer or failure to obey a reasonable safety rule of the employer, the compensation and death benefits are reduced at least twenty-five but not more than fifty percent. However, it must be shown that the employee had actual knowledge of the employer's safety rule and the employer had made a reasonable effort to make sure that the employee used the safety device or obey the safety rule.

The new law repeals the requirement for an employer to post the rule in a conspicuous place on the employer's premises. The safety changes will encourage employees to use the safety devices provided by the employer and follow the safety rules adopted by the employer.

Does the new law change the reduction in benefits for an injury sustained by the employee based upon the use of drugs or alcohol? (Section 287.120.6, RSMo)

Under the new law, if the employee fails to obey any rule or policy adopted by the employer on a drug-free workplace or on the use of alcohol or non-prescribed controlled drugs in the workplace, and the employee sustains an injury while using alcohol or non-prescribed controlled drugs, the compensation and death benefits shall be reduced fifty percent. If the employee's use of alcohol or non-prescribed controlled drugs in violation of the employer's rule or policy is the proximate cause of the employee's injury, the benefits or compensation payable for death or disability are forfeited.

Under the new law there is a rebuttable presumption that the alcohol was the proximate cause of the injury if the voluntary use of alcohol to the percentage of blood alcohol in the employee's system meets the legal intoxication standard under Missouri law. An employee, by a preponderance of the evidence standard, can overcome the presumption that the intoxication was not the proximate cause of the injury.

Under the law, an employer can request an employee to take a test for alcohol or a non-prescribed controlled substance if the employer suspects usage by the employee or if the employer's policy clearly authorizes the post-injury testing. If the employer does request a test of the employee when an injury occurs and the employee refuses to take the test, the employee forfeits all workers' compensation benefits.

Does the new law make any changes to an employee who sustains an injury while participating in a recreational activity or program?

(Section 287.120.7, RSMo)

The current law specifically excludes from coverage only injuries resulting from *voluntary* participation in a recreational activity or program that is the proximate cause of the injury. The new law deletes the words "voluntary" and "proximate." The benefits are forfeited where the recreational activity or program is the prevailing cause of the injury regardless of the fact that the employer may have promoted, sponsored or supported the recreational activity or program. The forfeiture of benefits does not apply when the employee was directly ordered by the employer to participate in the recreational activity or program, or the employee was paid wages or travel expenses while participating, or the injury occurs on the employer's premises due to an unsafe condition of the premises and the employer had actual knowledge of the employee's participation in the recreational activity or program and of the unsafe condition of the premises and failed to stop the activity or cure the unsafe condition.

Have there been any new crimes added to the workers' compensation fraud statutes? (Section 287.128, RSMo)

The new law makes it unlawful for any person, company or entity to prepare or provide an invalid certificate of insurance as proof of workers' compensation coverage. An invalid certificate of insurance is one that the employer procures or uses to show that the employer has workers' compensation insurance when in fact no such insurance is in place.

The new law also makes it unlawful for any person to knowingly make or cause to be made a false or fraudulent material statement to an investigator of the Division who is investigating an allegation of fraud or noncompliance.

What are the penalties under the new law for workers' compensation fraud? (Section 287.128, RSMo)

The penalties for certain types of fraud are raised to a class D felony from a class A misdemeanor. For example, any person who knowingly presents a false or fraudulent claim for the payment of benefits on a workers' compensation claim, or any insurance company or self-insured employer refusing to comply with known and legally indisputable compensation obligations with intent to defraud.

The following fraud cases are still regarded as a class A misdemeanor. These include, but are not limited to, to knowingly present multiple claims for the same occurrence with intent to defraud, to knowingly assist or conspire with any person who knowingly presents a false or fraudulent claim for the payment of benefits, to knowingly submit a claim for a health care benefit that was not used by or on behalf of the claimant, to knowingly make false or fraudulent statements with regard to entitlement to benefits with the intent to discourage an injured worker from making a legitimate claim.

The language regarding fines has been changed from "not to exceed" to "**up to** ten thousand dollars or double the value of the fraud whichever is greater."

If a person has previously been found to be guilty or pled guilty to workers' compensation fraud, and subsequently commits fraud, that person shall be guilty of a class C felony.

If a person prepares or provides an invalid certificate of insurance as proof of workers' compensation coverage the person is guilty of a class D felony and is liable to the state of Missouri for a fine up to ten thousand dollars or double the value of fraud, whichever is greater.

What is noncompliance and what are the penalties for an employer who does not insure its workers' compensation liabilities as required by law? (Section 287.128, RSMo)

Every employer who is subject to the requirements of the workers' compensation law must insure its entire workers' compensation liability with an insurance carrier that is authorized to insure such liability in the State of Missouri by the Missouri Department of Insurance or qualify to be a self-insured employer by the Division of Workers' Compensation. Noncompliance is the failure of the employer to carry workers' compensation insurance when required to do so under the law.

An employer who knowingly fails to insure its workers' compensation liabilities is guilty of a class A misdemeanor and liable to the state of Missouri for a penalty of up to three times the annual premium or up to fifty thousand dollars, whichever amount is greater. A subsequent violation is a class D felony.

Is there any change in the way the administrative law judges are evaluated? (Section 287.610, RSMo)

The new law creates an "Administrative Law Judge Review Committee." The Division Director along with the members of the

"Administrative Law Judge Review Committee" will develop written performance audit standards by October 1, 2005. An Administrative Law Judge's (ALJ) performance will be reviewed every two years. The ALJ's are appointed for twelve-year terms and are subject to a retention vote at the end of each term. The terms are staggered. Upon completing the performance audit for the ALJ's, the Committee will make a recommendation of confidence or no confidence for each ALJ. An ALJ who receives two or more votes of no confidence under the performance audit may have their appointment immediately withdrawn. Under the current law, all judges' are reviewed annually based upon the performance standards that are currently in place, the composition of the ALJ review committee is different and the judges are not subject to term limits and reappointment.

Has the new law made any changes to the Workers' Compensation Poster that an employer is required to post upon its premises for an employee to see? (Section 287.127, RSMo)

The new language requires the Division to include a provision on the poster that employees who fail to notify the employer within thirty days of the injury or illness may jeopardize their ability to receive compensation and any other benefits under the workers' compensation law.

Insurers and third party administrators had ten days to report an injury to the Division. Has that changed in the new law? (Section 287.380, RSMo)

Yes. Insurers and third party administrators have thirty days from the employer's knowledge of the injury to file a First Report of Injury with the Division of Workers' Compensation under the rules and in such form and detail as the Division may require. The new law remains that any employer or insurer who knowingly fails to report any accident to the Division or knowingly makes a false report or statement in writing to the Division shall be deemed guilty of a misdemeanor.

Are there any changes to the law with respect to the total medical costs that an employer can pay in a workers' compensation case that is not used in adjusting the experience modification factor? (Section 287.957, RSMo)

Under the new law an employer may pay up to one thousand dollars ($1,000.00) out-of-pocket for injury related medical costs only if there is no lost time greater than three days and no claim for compensation is filed by the employee. Payment of the total medical costs that do not exceed one thousand dollars cannot be applied to adjust the employer's workers' compensation experience modification for the determination of insurance premiums. If medical costs exceed one thousand dollars, the employer's insurance company must pay the costs and reimburse the employer for any out-of-pocket expenses already paid. Even if the employer pays the medical costs, this injury must still be reported to the Division.

Can an employer require employees to take leave time away from work for medical treatment of the employee's workers' compensation injury? (Section 287.140, RSMo)

Under current law, the employer can require an employee to take leave time when work is missed for all medical treatment except physical rehabilitation visits and the rating evaluation. With the new law, the employer may allow or require the employee to use accumulated paid leave, personal leave or medical or sick leave to attend to medical treatment, including physical rehabilitation visits and the rating evaluation. The mileage reimbursement requirements are also changed whereby travel expenses are paid to the employee if the employee is required to travel outside of the local or metropolitan area from the employee's principal place of employment. Current law allows mileage reimbursement from the employee's place of residence or place of injury.

Is the bonus that an employer gives to an employee included in calculating an employee's average weekly wage for receiving workers' compensation benefits under the law? (Section 287.253, RSMo)

An employer may pay a bonus to an employee in an amount up to three percent of the employee's annual compensation without the bonus being used in the calculation of the employee's average weekly wage.

What are changes in the new law with respect to attorney's fees? (Section 287.390, RSMo)

Under the current law, the Division or Commission regulates attorney's fees with respect to fairness and reasonableness of the fees requested by the attorney. The new law does not change the determination of the fairness and reasonableness of the attorney's fees by the Division or Commission. However, under the new law, if the employer/insurer makes an offer of settlement to the employee in writing, and files it with the Division, an employee will receive one hundred percent of the amount offered if the employee is not represented by an attorney at the time the offer is tendered. If the employee retains an attorney and additional proceedings occur on the employee's claim, the employee will still receive one hundred percent of the amount initially offered by the employer/insurer. The employee's attorney shall receive reasonable fees for services rendered. It is unclear whether the new law restricts attorney's fees to the dollar amount in excess of the initial settlement amount offered by the employer/insurer.

Does the new law make any changes to an Administrative Law Judge's authority to approve settlements made between the employer/insurer and the employee? (Section 287.390, RSMo)

The parties to the workers' compensation case may enter into voluntary agreements to settle or compromise any dispute or claim for compensation. In order for the agreement to be valid, it must be approved by the Administrative Law Judge or Commission. The settlement must be in accordance with the rights of the parties. The Administrative Law Judge or Commission shall approve a settlement agreement as valid and enforceable as long as the settlement is not the result of undue influence or fraud, the employee fully understands his or her rights to benefits, and voluntarily agrees to accept the terms of the agreement.

Are there any changes in the new law with respect to permanent partial disability benefits? (Section 287.190, RSMo)

Permanent partial disability means a disability that is permanent in nature and partial in degree. The percentage of disability is conclusively presumed to continue undiminished when payments are made as follows: (i) a settlement approved by either the Administrative Law Judge or Commission; (ii) a rating established by medical finding, certified by a physician and approved by an Administrative Law Judge; or (iii) an award by the Administrative Law Judge or Commission. The new law has added the language "rating established by medical finding certified by a physician."

The new law provides that permanent partial disability or permanent total disability shall be demonstrated and certified by a physician. Medical opinions that address compensability and disability must be stated within a reasonable degree of medical certainty. Further, if conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are defined as "findings demonstrable on

physical examination or by appropriate tests or diagnostic procedures." The new law also states that an award shall be reduced in a proportionate amount for any preexisting disease or condition or for the process of natural aging that may have caused or prolonged the disability or need of treatment.

If an injured employee collected unemployment insurance benefits while he or she was off work, what can the employer do? (Section 287.170, RSMo)

Under current law, an employer is entitled to receive a dollar-for-dollar credit for unemployment compensation paid to the employee and charged to the employer for the adjudicated or agreed-upon period of temporary total disability benefits. Under the new law, an employee is disqualified from receiving unemployment compensation and temporary total disability benefits at the same time. The disqualification from receiving temporary total disability benefits is only for the period of time in which the employee received unemployment compensation.

Is there a situation where an employee is not entitled to receive potential temporary total or temporary partial disability benefits under the new law? (Section 287.170, RSMo)

A new concept of "post-injury misconduct" has been introduced into the workers' compensation law. If the injured employee returns to work and is terminated from that employment due to "post-injury misconduct" the employee is not eligible to receive temporary partial or temporary total disability benefits. The phrase "post injury misconduct" does not include absence from the work place due to an injury unless the employee is capable of working with restrictions, as certified by a physician.

The decibel levels for measuring hearing loss were increased in the new law. Does this change the amounts paid to employees that suffer a hearing loss? (Section 287.197, RSMo)

The new standards are the current equivalent of the old statutory standards. What has changed over the years is how hearing loss is measured. The change in equipment and in the understanding of hearing loss has brought about the new decibel levels. The new language adopts the most current decibel standards developed by the American National Standards Institute (ANSI) for measuring hearing loss.

Have there been any changes to the definition of "employee" under the new law? (Section 287.020.1, RSMo)

The definition of employee does not include an individual who is: (i) the owner, as defined by §301.010 (43), and (ii) operator of a motor vehicle which is (iii) leased or contracted with a driver, (iv) to a for-hire motor carrier operating under a certificate issued by the Missouri or United States Department of Transportation or by any of its sub-agencies. The new law abrogates certain cases that interpret the meaning or definition of "owner."

What are the changes under the new law with respect to statutory employers and owner/operators? (Sections 287.040 and 287.041, RSMo)

The new law deletes subsection 2 of section 287.040 RSMo that applied to the relationship of landlord and tenant, and lessor or lessee, when created for the fraudulent purpose of avoiding liability. The new law adds a new subsection that states §287.040 does not apply to the relationship between a for-hire motor carrier and an owner and operator of a motor vehicle. The new law also creates a new Section 287.041 that states notwithstanding the provisions of the workers'

compensation law as it applies to who is considered an employer or statutory employer, a for-hire motor carrier shall not be determined to be the employer of: (i) a lessor defined by 49 C.F.R. §376.2 (f) or (ii) a driver receiving remuneration from a lessor. The term "for-hire motor carrier" shall not include an organization described in §501 (c) (3) of the Internal Revenue Code or any governmental entity. The new law abrogates certain cases that interpret the meaning or definition of "owner."

Was the Second Injury Fund surcharge changed?
(Section 287.715, RSMo)

Under the new law, the surcharge set each year to fund the Second Injury Fund is capped at three percent (3%) of the workers' compensation premiums paid. The new law provides that cap becomes effective on January 1, 2006. The surcharge cap will apply to policies issued to employers during calendar year 2006. Current law contains no cap, which allows the surcharge to be set at any rate that generates the revenue to pay benefits from the Fund.

Further Information

Employees' Information Line 800-775-2667
Employers' Information Line. 888-837-6069

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